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JAMES R. BROWNIN

No. 98

In the Supreme Court of the United States

October Term, 1959

UNION PACIFIC RAILROAD COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, WESTERN DIVISION

BRIEF OPPOSING MOTION TO AFFIRM

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Pursuant to Rule 16.3 of the Revised Rules of this Court, appellant files this brief opposing the motion of the United States that the judgment of the United States District Court for the Southern District of Iowa, Western Division, be affirmed.

I.

APPELLANT'S PERFORMANCE FOR ALL SHIPPERS AT ONE AND THE SAME PUBLISHED TARIFF RATE, WHICHEVER OF TWO TYPES OF SERVICE—FAST OR SLOW—IS ELECTED BY THE SHIPPER, WITHOUT TARIFF SPECIFICATION OF OPERATING SCHEDULE OR TIME CONSUMED BY EITHER TYPE SERVICE, DOES NOT VIOLATE SECTION 6(7) OF THE INTERSTATE COMMERCE ACT OR SECTION 1 OF THE ELKINS ACT.

Appellant, in connection with other railroads, publishes tariffs naming rates and charges for hauling lumber from the Northwest to destinations in the East and

South. These tariffs do not specify the operating time schedules or whether the shipments will be hauled in a fast or slow service. The Motion to Affirm properly admits (p. 7) that "operating time schedules are not required to be filed," for there is no provision of law or any order, rule or regulation of the Commission requiring railroads to specify in tariff form their operating schedules or the type service—fast or slow—they will perform for the rate or charge published in the tariff.

To meet the needs of shippers' marketing and distribution methods and to enable it to compete with longer and greater time-consuming railroad routes, appellant has for many years offered to all shippers either a fast or a slow service for the same rate named in the published tariff applicable to the commodity shipped over appellant's routes or the longer routes (J. S. pp. 4-9). The shipper may elect either the fast or slow service as his particular shipments might require from time to time.

Although properly admitting that operating time schedules are not required to be filed in the tariffs, the Motion to Affirm argues that "expedited or delayed" service does require tariff specification and that it is immaterial that appellant offers through customary information memoranda and solicitors the two types of service equally to all shippers. Though arguing that published tariff rates necessarily apply only to "normal" service and that "expedited or delayed" service requires tariff specification as a departure from "normal" service, the argument completely overlooks the fact that appellant renders only two types of lumber service—fast and slow—and has no "standard" of "normal" service, artificially set up for the purpose of argument in the Motion to Affirm.

Appellant's fast service is no more "normal" than its slow service, and could be called an "expedited" serv-

ice in comparison with its slow service. But neither the fast nor the slow service is a "normal" or "special" service. Certainly, Counsel for the Government is not at liberty to select either the fast or the slow service and use it, in the absence of a statutory "standard," to condemn, or measure the "legal quality" of the other service. Yet, the Motion to Affirm (pp. 7-9) argues that the slow service (but not the fast service) is a "privilege" or "facility" without specification in tariffs, in violation of Section 6(7) of the Act because a shipper electing that service has for a longer time the "free use" (though at published tariff rates) of cars in which his lumber is hauled than he has if he elects appellant's fast service. But, since all shippers may, and do, elect either service, the argument is untenable for it merely is that by his election of the slow service a shipper gains an unlawful advantage over himself, and creates a discrimination against himself because he did not elect the fast service. And the argument is further untenable for it overlooks the fact that the fast service is more "expeditious" than the slow service, and is far more "advantageous" than the slow service under some conditions, as argued in cases cited in the Motion to Affirm, pages 10 and 12.

The Motion to Affirm argues that the slow service also results in concessions and advantages to shippers using that service whereby their property is transported at less than tariff rates even though the tariff rates are admittedly collected and retained by appellant. The slow service, it is argued, is "necessarily a *pro tanto* reduction of the charge for the services required to be given." But this overlooks the fact that the tariff which publishes the rate or charge for the transportation services does not and—under the Government's own admission—is not required to specify any operating schedule or the type of service offered to be performed for the published

rate. The fast service, being more expeditious, might well be more costly to appellant and advantageous to the shipper than is the slow service, and, thus, also result in the same kind of alleged reduction of the published tariff charge.

The Motion to Affirm further argues (p. 9) that the slow service results in discrimination against shippers who do not use it but must pay the same freight rate—plus demurrage—if they fail promptly to unload the cars at destination. But, as we have just demonstrated, this reasoning overlooks vital fundamentals which necessarily vitiate the argument. While the needs of some shippers may cause them to use one type of service more often than the other type, the availability of both services is not limited to any particular group of shippers but is offered to all, and the shipper who uses the fast service today might be, and often is, the same shipper who desires and uses the slow service tomorrow; or the same shipper might, and does, use both types of service for different shipments on the same day. The argument that the shippers using the fast service are discriminated against because they would have to pay demurrage *if* the shipments are not unloaded within the free time (48 hours) at destination is fallacious and untenable, for, regardless of fast or slow movement en route, demurrage is collectible on *all* shipments not unloaded within 48 hours after delivery at destination.

In arguing that, while operating time schedules for "normal" service are not required to be filed, the offering of "expedited or delayed" service must be filed in tariff form, we think the Motion to Affirm misconstrues the requirements concerning what must be filed in tariffs. While Section 6(1) of the Act requires railroads to file tariffs showing all their "rates, fares and charges for transportation" and "all privileges and facilities" which

"change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee" and further requires railroads to file and publish "all other charges which the Commission may require," there is no provision of law, and the Commission has never in the 72 years of its existence issued any order, rule or regulation expressly requiring railroads to publish their operating schedules or to state in tariff form the operating time or schedules of their trains or whether they propose to haul one train or one shipment faster than others.

While the cases cited in the Motion to Affirm abound with dicta and gratuitous statements concerning the purposes of the Interstate Commerce Act and the Elkins Act, not one of them involves facts or circumstances comparable at all with those involved in the instant case. The Government's brief quotes copiously from the dicta and academic statements in the cited cases but does not disclose the complete dissimilarity of facts which distinguish this case from those cited and make them inapplicable to the instant case.

Turner, Dennis & Lowry Lbr. Co. v. Chicago, M. & St. P. Ry. Co., 271 U. S. 259, was a suit by a shipper to recover four days' demurrage charges at ten dollars a day paid the railroad by the shipper on a carload of lumber during a car shortage. The shipper contended that the charge was unconstitutional and inflicted undue prejudice against lumber shippers. Neither Section 6(7) of the Interstate Commerce Act nor the Elkins Act was involved, nor did the case involve competition of one railroad with others, nor line-haul service by one carrier to meet competition of another, or the type service required by shippers.

Chicago & Alton R. R. Co. v. Kirby, 225 U. S. 155, was an action *in assumpsit* by one shipper to recover damages for failure of the railroad to carry out a *special agreement* with the shipper to transport one shipment of horses from Springfield to Joliet, Illinois, in time to meet a "horse special" train of the Michigan Central Railroad, due to arrive in New York at a particular time which would enable Kirby's horses to be entered in a horse sale in New York. The regular tariff rates were to be charged. The Court held the contract unlawful for the principal reason that it placed the railroad under a liability different and more burdensome than its common law liability. The Court said that for such special service and greater responsibility the railroad "might" exact a higher rate, but to do so the railroad must make and publish "a rate open to all." While the Court held that, if a higher rate were charged, it must be published, the crux of the decision clearly is that by making a special contract with Kirby for expedited service of a single shipment at the regular tariff rates a special advantage was given him which was "not open to all". That decision does not require condemnation of appellant's slow service in the instant case for that service is "open to all" through the same type of publicity or dissemination of information to shippers of all operating schedules or types of service offered to shippers by appellant, and the service is undeniably offered to and performed alike for all shippers of all traffic, including "roller" and "firm order" lumber traffic. No extra charge or higher rate is made and no tariff publication is required under the *Kirby* decision.

Eastern Shore of Va. P. Exch. v. New York, P. & N. R. Co., 126 S. E. 674, was a suit for damages based on the railroad's failure to accomplish a shipper's order to "divert" two carloads of cabbage to Jersey City instead of New York, the original destination. Recovery was denied upon the

court's holding that the diversion order amounted to a *special contract* with the one shipper to delay the shipment, and was, therefore void. It is shown by the language at page 676 that the "possibility of discrimination between shippers" was the basis of that decision. There is no such possibility of discrimination in the instant case because appellant's slow service is admittedly offered to and performed alike for all shippers of all traffic.

Louisville & N. R. Co. v. Warren County S. G. Ass'n, 267 S. W. 551, was a suit for damages upon a special contract to deliver certain carloads of strawberries at New York within 78 hours and 45 minutes and at Philadelphia within 55 hours after departure from Bowling Green, Kentucky. The court denied recovery because the special contract with the one shipper "extended a discriminatory preference to it that no other shipper enjoyed under appellant's tariffs." Although the court said that if "time of delivery" is offered as a part of the service it should be published in tariffs, it is made clear at page 552 that this was merely to make the service "open to the shipping public at large, on equal terms." In the instant case appellant's slow service is unquestionably open to the shipping public at large and does not extend any discriminatory preferences to any shipper but is performed for all shippers alike upon equal terms. The service is not the result of special contracts with individual shippers but of the customary publicized information circulars advertising the availability of the service to the shipping public at large.

Atchison, T. & S. F. Ry. Co. v. Springer, 172 F. 2d 346, was a suit by the railroad to recover 47 days' demurrage on one carload of shavings or sawdust. After the car had arrived on the consignee's sidetrack the shipper gave a "diversion" or reconsignment order to the railroad's agent which order did not conform to tariff re-

quirements because it was both verbal and conditional to the extent that it would have required the railroad employees to go on the consignee's private sidetrack, and to weigh the contents of the car. The court held the diversion order to be a nullity and ordered judgment for the railroad. The case bears no resemblance whatsoever to the case at bar.

Siebert v. Erie R. Co., 179 N. Y. S. 136, affirmed 134 N. E. 553, was a suit by a shipper to recover for the loss of certain freight from a car which had been temporarily left on a sidetrack en route "solely for the accommodation of the shipper." The court held that the agreement to leave the car on the sidetrack was unlawful and ordered judgment for the shipper. The court, at page 140, held that the agreement to extend this privilege to that shipper was unlawful because "other shippers paying the same rate for transportation" were not entitled to such accommodation under the bill of lading and tariffs of the railroad. The case does not aid the Government in the instant case because here appellant's slow service is admittedly offered to and performed for all shippers alike at exactly the same rates for transportation.

B. & O. R. Co. v. U. S., 305 U. S. 507, was a case in which the Court sustained the validity of an order of the Interstate Commerce Commission condemning as unlawful a practice of certain railroads in the Port of New York furnishing and providing warehouse space and services to shippers at less than cost to the carriers and at less than the rates charged by private warehousemen. In the instant case the appellant collects and retains the published tariff rates and charges and provides only such facilities and performs only the services that are necessary and incident to the transportation services which it offers to perform to the public at the published tariff rates.

II.

THE DISTRICT COURT ERRED IN REFUSING TO APPLY THE RULE OF PRIMARY JURISDICTION.

The Motion to Affirm (pp. 12-15) oversimplifies the case in its efforts to support the refusal of the district court to apply the rule of primary jurisdiction. The court did not issue the injunction merely to have the Commission determine the lawfulness of appellant's slow service. The Commission already had that power and duty, upon its own initiative, under Sections 13(2) and 15(1) of the Interstate Commerce Act. Instead of remanding the case to the Commission the district court proceeded to make its own administrative findings that the slow service results in an "advantage" to shippers using it and a "discrimination" against shippers who do not desire or use the slow service, and that the slow service constitutes "privileges or facilities" not specified in the published tariffs. On these administrative findings of fact the district court made conclusions of law (J. S., App. B, pp. 27-29) condemning the slow service as violations of Section 1 of the Elkins Act and Section 6(7) of the Interstate Commerce Act and the decree enjoins the asserted violations.

Thus, despite the district court's recognition that it is the Commission's function to determine whether appellant's slow service is "reasonable," and the court's denial that its decision holds that the slow service is "unreasonable" (J. S., App. B, p. 27), the court clearly usurped the Commission's administrative function by making its own determination of the "legal quality" of the slow service. The very basis of the injunction necessarily lies in the court's own findings of fact which are clearly within the exclusive primary administrative jurisdiction of the Commission. (See discussion and cases cited, J. S., pp. 16-23.)

Whether appellant may lawfully offer and perform for all shippers at their election either of two types of

service (fast or slow) for the same published tariff rate raises, among others, administrative questions of fact (1) whether the published tariff rate is a reasonable rate for both the fast and slow service, (2) whether offering both services to all shippers for the same tariff rate, but performing the slow service only for shippers electing that service, results in unlawful advantage to those shippers electing slow service and in discriminations against shippers who do not desire or elect the slow service, and, (3) whether performance for the same shipper, at his election, of fast service for some of his shipments and slow service for others of his shipments could possibly result in any unlawful advantage or discrimination.

Those are questions of fact, and not of law, which present "issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that [Interstate Commerce] Act," *United States v. Western Pac. R. Co.*, 352 U. S. 59, 65. And for more than 50 years this Court has held that when such questions arise in a court case it is the duty of the courts "to remand the case to the Commission to enable it to perform that duty," *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 444. As stated by this Court in *General American Tank Car Corp. v. El Dorado T. Co.*, 308 U. S. 422, at pages 432-433:

> "The policy of the Act is that reasonable allowances and practices, which shall not offend against the prohibitions of the Elkins Act, are to be fixed and settled after full investigation by the Commission, and that there is remitted to the courts only the function of enforcing claims arising out of the failure to comply with the Commission's lawful orders."

As appellant competes, at the same published tariff rate, with numerous other carriers in hundreds of routes over which the lumber traffic moves from the Northwest

to the East and South, a fundamental reason why the district court should have applied the rule of primary jurisdiction in this case is "the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions," *United States v. Western Pac. R. Co.*, supra, p. 64. But the Commission, the Department of Justice and the district court have simultaneously dealt with the question whether competing railroads may perform a fast and a slow service for the same rate at the election of shippers, as if to obtain results just the opposite of uniformity. Simultaneously with the filing of the instant case the Government also filed a similar action in the United States District Court for the District of Minnesota, entitled *United States of America v. Northern Pacific Railway Company*, Civil Action No. 3-57-164, which is now pending in that court; the Commission had investigated and developed the facts which lead to the filing of both actions by the Department of Justice, although the Commission had authority under Section 13(2) and Section 13(1) of the Interstate Commerce Act to conduct proceedings on its own motion, at which the defendants in the two suits and other carriers competing for the lumber traffic could have been heard, and to make such findings, requirements and orders as it deemed necessary.

While in these two court actions the Government was contending that the defendant railroads should file tariffs publishing slow service, six other railroads that compete for the lumber traffic did file tariffs with the Commission publishing a slow service which they had already performed over their lines, but the Commission promptly suspended those tariffs and now has under consideration a complete investigation for eventual decision with respect to the validity of those tariffs (J. S., p. 11). Whatever order the Commission makes in that investigation will be subject to special statutory judicial review.

Both the Motion to Affirm and the district court hold that the rule of primary jurisdiction is not applicable in this case because the Elkins Act expressly empowers the courts to issue injunctions. But decisions of this Court hold that mere existence of such power in the courts is no excuse for their refusal to stay their hands and remand a case to the Commission which was especially created by Congress to determine whether rates, rules or practices of railroads result in unlawful advantages, discriminations or other prohibited results. *General American Tank Car Corp. v. El Dorado T. Co.*, 308 U. S. 422, 433. In *United States Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, this Court ordered an action alleging violations of the Sherman Anti-Trust Act dismissed on the ground that the matters set forth in the complaint, though stating a cause of action and furnishing ground for an injunction authorized by the anti-trust laws, were also within the exclusive administrative jurisdiction of the United States Shipping Board under the Shipping Act of 1916. At page 480 the Court said—

> "It may be conceded that looking alone to the Sherman Anti-Trust Act the bill states a cause of action under sections 1 and 2 of that act (15 USCA, §§ 1, 2) and consequently furnishes ground for an injunction under section 16 of the Clayton Act (15 USCA, § 26) unless the Shipping Act stands in the way; and this was the view of both courts below."

Far East Conf. v. United States, 342 U. S. 570, was a suit brought by the Government to enjoin alleged violations of the anti-trust laws. But this Court again ordered dismissal on the ground that the subject matter was within the administrative jurisdiction of the Federal Maritime Board, to which preliminary resort was required. Thus, application of the rule of primary jurisdiction depends not upon whether the courts have power to issue an injunction, but upon the question whether

the facts alleged present problems primarily within the jurisdiction of an agency especially created to make administrative determinations in a particular field.

The similarity between the facts and the decisions of this Court in the *Cunard* and *Far East* cases are of compelling significance. In both of those cases the Court, though clearly having injunctive power, applied the rule of primary jurisdiction and refused to enjoin certain steamship lines from charging two different rates for one type of transportation service, while in the instant case the district court refused to apply the rule of primary jurisdiction and enjoined appellant from performing two types of transportation service for one and the same rate. This Court's decisions in those cases clearly required the district court to remand the instant case to the Commission.

The Motion to Affirm, at pp. 14-15, argues that the rule of primary jurisdiction is not applicable here because the Commission has "clarified" its views concerning "intentional delays of shipment to suit a shipper's needs." While the cases cited in support of that contention contain general language which, in its context, indicated that the Commission is generally against such delays because they are not in the public interest or contribute to car shortages, none of the cases involved investigations, hearings, adjudications or determinations by the Commission of the administrative questions squarely presented and calling for decision by the Commission in this case. Certainly none of the cited cases constitutes a decision or a clarification of the question whether, for its own competitive needs as well as shippers' needs, a railroad's performance of two types of service for one published tariff rate, open to all shippers at their election, violates any provision of the Interstate Commerce Act or Elkins Act, or whether the published tariff rate

is a reasonable rate for both fast and slow service, or results in unlawful advanages or discriminations.

CONCLUSION

We submit that the questions presented by the appeal are substantial and of great importance in the interpretation and administration of the Interstate Commerce Act and the Elkins Act and to railroads and shippers generally.

Respectfully submitted,

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July, 1959

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for appellant, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 28th day of July, 1959, I served copies of the foregoing Brief Opposing Motion to Affirm on the adverse party, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable J. Lee Rankin
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2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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